

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :  
ASSOCIATION :  
:  
v. : Case No. PF-C-09-83-E  
:  
COMMONWEALTH OF PENNSYLVANIA :  
PENNSYLVANIA STATE POLICE :

**FINAL ORDER**

The Pennsylvania State Troopers Association (PSTA) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 23, 2010, challenging a Proposed Decision and Order (PDO) issued on December 3, 2010. In the PDO, the Board's Hearing Examiner concluded that the Commonwealth of Pennsylvania, Pennsylvania State Police (PSP) did not violate Section 6(1)(a) or (c) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111 of 1968, when the PSP issued disciplinary action reports to Trooper Joseph Plant, President of FOP Lodge 43, and Corporal Gerald Williams, Vice President of FOP Lodge 43.<sup>1</sup> Pursuant to an extension of time granted by the Board Secretary, the PSTA timely filed a brief in support of the exceptions on January 19, 2011. The PSP timely filed a brief in response to the exceptions on February 8, 2011.

The facts found by the Hearing Examiner are summarized as follows. Beginning in the spring of 2008, troopers at Troop P, Wyoming, complained to Trooper Plant and Corporal Williams that Captain Willard W. Oliphant, the Director of the Internal Affairs Division, was bringing trash to the barracks for disposal by the maintenance men. Some of the troopers thought that they would not be able to get away with similar conduct and asked Trooper Plant and Corporal Williams what they were going to do about it. The trash sometimes impeded access to patrol cars. During work time, Trooper Plant surreptitiously observed Captain Oliphant leaving trash at the barracks and took pictures of the trash with a PSP camera.

By late October 2008, the PSP had begun an internal affairs investigation of Corporal Williams for sending emails disparaging its command staff. On December 2, 2008, after a maintenance man at Troop P, Wyoming, told Corporal Williams that trash left at the barracks was Captain Oliphant's and that he was tired of disposing of it, Corporal Williams took a picture of the trash and told Lieutenant Michael J. Kreidler, the Commander of the Staff Services Section, that Captain Oliphant was bringing trash to the barracks for the maintenance men to dispose of, that "guys" were tired of seeing it and that a maintenance man was tired of disposing of it. Lieutenant Kreidler referred the matter to Captain Donald C. Peters, Troop P's Commanding Officer, who met with Corporal Williams later that day. After Corporal Williams reiterated what he told Lieutenant Kreidler, Captain Peters advised Corporal Williams to file a complaint against Captain Oliphant. Captain Peters also said something about casting a net and people getting caught up in it. Lieutenant Kreidler explained that in going after big fish, small fish might be caught. Troopers were washing their personal vehicles at the barracks at the time. Corporal Williams said that he only wanted Captain Oliphant's conduct to stop. Thinking that he was being subjected to disparate treatment, Corporal Williams also said that he would be bringing up Captain Oliphant's conduct at his own internal affairs investigation. Captain Peters said he would make sure that Captain Oliphant's conduct stopped.

On December 8, 2008, Sergeant Bruce Edwards, the PSTA's President, complained to Colonel Frank Pawlowski, the PSP's Commissioner, and to Lieutenant Colonel John Brown, the PSP's Deputy Commissioner of Administration and Professional Responsibility, that Corporal

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<sup>1</sup> The PSTA also alleged in its Charge that the PSP violated Section 6(1)(e) of the PLRA and Act 111 by modifying policies and guidelines governing grievances, grievance committees and grievance resolution procedures. The PSTA did not prosecute that portion of the Charge at the hearing and, therefore, that issue was not addressed by the Hearing Examiner. International Union of Operating Engineers, Local 66 v. Connoquenessing Township, 41 PPER 47 (Final Order, 2010) (issues not raised before hearing examiner are waived); Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 40 PPER 125, n.1 (Proposed Decision and Order, 2009) (same).

Williams' emails were not as damaging to the command staff's ability to command as Captain Oliphant's bringing of trash to the barracks for disposal by the maintenance men. Lieutenant Colonel Brown referred the matter involving Captain Oliphant to Major Charles Skurkis, the Director of the PSP's Bureau of Integrity and Professional Standards, who decided that there was no need for an internal affairs investigation of Captain Oliphant.

On December 17, 2008, Sergeant Jay Livzief, the investigator in the internal affairs investigation of Corporal Williams, rescheduled an interview of Corporal Williams from January 6, 2009, to December 19, 2008. Sergeant Livzief had originally scheduled the interview for January 2009 because Corporal Williams was unavailable to meet on an earlier date due to a trial. Sergeant Livzief moved up the interview after the trial did not go forward and Captain Oliphant advised him that Captain Peters wanted the investigation concluded as soon as possible so that Captain Peters would be able to adjudicate the matter in a timely fashion.

On December 19, 2008, Trooper Plant complained to Lieutenant Colonel Brown at a grievance meeting that Captain Oliphant was bringing his trash to the barracks for disposal by the maintenance men, that he was concerned that Captain Oliphant may have prompted the change in the date of Corporal Williams' interview with Sergeant Livzief and that the maintenance men were tired of dealing with Captain Oliphant's trash.

On December 23, 2008, Lieutenant Colonel Brown told Major Skurkis about Trooper Plant's complaint regarding Captain Oliphant. Major Skurkis directed Captain Peters to initiate an internal affairs investigation of Captain Oliphant. Captain Peters filled out a use of force or complaint reception and processing work sheet alleging as follows:

On December 2, 2008, Cpl. Gerald Williams, Troop P Polygraph Unit, verbally informed Lt. Michael Kreidler (C.O. Staff Section, Troop P) and I that Captain Oliphant had been bringing his personal trash to the Wyoming HQ station to have the janitors put the trash in the station dumpster. Cpl. Williams stated the maintenance guys said they are tired of dealing with it, and that he (Cpl. Williams) felt the action is inappropriate. I advised Cpl. Williams to complete a SP1-101 if he wished to make this a formal complaint. Cpl. Williams came to me that afternoon and said he did not want the matter to go to an IAD; he just wanted the conduct to stop. It was subsequently brought to the attention of the Deputy Commissioner of Administration and Professional Responsibility by the PSTA.

Major Skurkis assigned Lieutenant Nicholas Saites, Captain Oliphant's subordinate in Internal Affairs, to conduct the investigation of Captain Oliphant.

On January 8, 2009, Lieutenant Saites interviewed Captain Peters, Lieutenant Kreidler, Corporal Thomas Wall, a maintenance man and Captain Oliphant as part of his investigation of Captain Oliphant. Sergeant Livzief, who was assisting Lieutenant Saites, also interviewed a maintenance man. No one told Lieutenant Saites that a maintenance man had complained about disposing of Captain Oliphant's trash.

On January 14, 2009, Lieutenant Saites interviewed Corporal Williams next to last as part of his investigation of Captain Oliphant. The subject of an internal investigation is usually interviewed last. Corporal Williams told Lieutenant Saites that no maintenance man had complained about disposing of Captain Oliphant's trash.

On January 20, 2009, Lieutenant Saites interviewed Trooper Plant last as part of his investigation of Captain Oliphant. Trooper Plant gave Lieutenant Saites the pictures he had taken of Captain Oliphant's trash and told Lieutenant Saites that he had surreptitiously taken the pictures with a PSP camera while on duty after he observed Captain Oliphant leaving the trash.

In a general investigative report (IAD# 08-0864) dated February 1, 2009, Lieutenant Saites wrote that no maintenance man had complained about disposing of Captain Oliphant's trash, that Corporal Williams had investigated who left the trash and that Trooper Plant had surreptitiously observed Captain Oliphant leaving trash at the barracks and had taken

pictures of the trash with a PSP camera. Upon reviewing the report, Major Skurkis found the complaint against Captain Oliphant to be unfounded and forwarded the report to the Commanding Officer of Troop P.

On May 18, 2009, Captain John T. Dougherty, who had been the Commanding Officer of Troop P for two days, reviewed the report and found that Trooper Plant and Corporal Williams had misrepresented that maintenance men complained about disposing of Captain Oliphant's trash and had conducted an unauthorized investigation of Captain Oliphant. Despite some skepticism about the report, Captain Dougherty, without instruction from anyone higher up in the chain of command, sustained the allegations against Trooper Plant and Corporal Williams and issued a notice of pre-disciplinary conference and summary report to each of them.

On June 5, 2009, Captain Dougherty issued disciplinary action reports to Trooper Plant and Corporal Williams. In the report for Trooper Plant, Captain Dougherty wrote, in pertinent part, as follows:

Based upon the facts contained in IAD Investigation 2008-0864, it is evident that from the onset of the investigation that you, for reasons unknown, misrepresented the facts and misled the Command Staff at Wyoming and other Department Personnel, by implying that you had received complaints on the matter. You also repeated similar statements regarding complaints during a meeting on December 19<sup>th</sup>, 2009. On January 26, 2009, Corporal Gerald Williams stated that no one in fact ever complained about this matter. The investigation revealed no one at Troop P, Wyoming who complained and the maintenance staff when interviewed said that they never complained. These actions reflect that you were untruthful, misrepresented facts, and this raise [sic] several integrity issues that need to be addressed.

Additionally you conducted, what is without question, an investigation into another member while you were on Commonwealth paid time, using Commonwealth resources. You were also aware, due to a past similar case, the allegations you made were neither violations of Department regulations nor law.

In the report for Corporal Williams, Captain Dougherty wrote, in pertinent part, as follows:

Based upon the facts contained in IAD Investigation 2008-0864, it is evident that from the onset of the investigation that you, for reasons unknown, misrepresented the facts and misled the Command Staff at Wyoming and other Department Personnel, by implying that you had received complaints on the matter. On January 26, 2009, you stated that no one in fact ever complained to you. The investigation revealed no one at Troop P, Wyoming who complained and the maintenance staff when interviewed said that they never complained. These actions reflect that you were untruthful, misrepresented facts, and this raise [sic] several integrity issues that need to be addressed.

Additionally, you conducted, what is without question, an investigation into another member while you were on Commonwealth paid time, using Commonwealth resources. You were also aware, due to a past similar case, the allegations you made were neither violations of Department regulations nor law.

In late February or early March 2010, the PSP rescinded the disciplinary action reports for Trooper Plant and Corporal Williams after Captain Dougherty, having become more acclimated to his command, initiated a further investigation in August 2009.

The PSTA filed its Charge of Unfair Labor Practices on June 19, 2009, alleging that the PSP violated Section 6(1)(a), (c) and (e) of the PLRA and Act 111 by issuing

disciplinary action reports to Trooper Plant and Corporal Williams for engaging in protected activity and modifying policies and guidelines governing grievances, grievance committees and grievance resolution procedures. Two hearings were held before the Board's Hearing Examiner on April 12, 2010 and September 24, 2010, during which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The Hearing Examiner concluded in the PDO that the PSP did not violate Section 6(1)(c) of the PLRA because the PSTA failed to establish that the PSP's issuance of the disciplinary action reports to Trooper Plant and Corporal Williams was motivated by anti-union animus. The Hearing Examiner further concluded that no independent violation of Section 6(1)(a) could be found because the PSTA failed to sufficiently allege such a violation in its Charge. Therefore, the Hearing Examiner dismissed the PSTA's Charge of Unfair Labor Practices.

The PSTA does not challenge any of the Hearing Examiner's findings of fact in its exceptions. Therefore, the Hearing Examiner's findings of fact are conclusive. FOP Lodge #5 v. City of Philadelphia, 34 PPER 22 n.3 (Final Order, 2003).

The PSTA alleges in its exceptions that the Hearing Examiner erred in concluding that it failed to establish a discriminatory motive for the PSP's issuance of the disciplinary action reports to Trooper Plant and Corporal Williams. The PSTA contends that the PSP's actions of investigating and disciplining Trooper Plant and Corporal Williams for their protected activity evidences anti-union animus, citing Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010), aff'd sub nom., Commonwealth of Pennsylvania, Pennsylvania State Police v. PLRB, 626 C.D. 2010 (Pa. Cmwlth. 2011) (opinion not reported) (discrimination found where PSP's action of instituting internal affairs investigation was based upon employee's protected activity). The PSTA further alleges that anti-union animus can be inferred through the PSP's failure to adequately explain its actions, the PSP's disparate treatment of Trooper Plant and Corporal Williams and the inherently destructive nature of the PSP's discipline of Trooper Plant and Corporal Williams on the employees' ability to voice concerns about working conditions without fear of reprisal.

In order to sustain a charge of discrimination under Section 6(1)(a) and (c) of the PLRA, the charging party must prove (1) that the employees engaged in protected activity, (2) that the employer was aware of the employees' protected activity, and (3) that the employer took adverse action against the employees because of a discriminatory motive or anti-union animus. FOP, Lodge No. 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007) (citing St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977)). The charging party must demonstrate that all three elements are present in order to establish a prima facie case under Section 6(1)(c) of the PLRA. Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER ¶ 88 (Final Order, 2005). The burden then shifts to the respondent to rebut the charging party's prima facie case. PLRB v. Commonwealth of Pennsylvania, Department of Education, Edinboro State College, 14 PPER ¶ 14054 (Final Order, 1983).

The PSTA asserts that the facts in the present case are similar to those in Pennsylvania State Police, supra. The PSTA therefore alleges that the PSP's actions of investigating and disciplining Trooper Plant and Corporal Williams for their protected activity are sufficient to establish anti-union animus. However, the PSTA's reliance on Pennsylvania State Police is misplaced. In that case, the PSP initiated an internal affairs investigation against the employee concerning his protected activity and the Board found that the PSP thereafter disciplined that employee for engaging in that protected activity. Here, the Hearing Examiner found that the discipline was initiated against Trooper Plant and Corporal Williams not for engaging in the protected activity, but for the misrepresentations during the investigation of Captain Oliphant and revelations that came to light in that process. In concluding that the PSTA failed to meet its burden of establishing that the PSP's actions were in retaliation for protected activity by Trooper Plant and Corporal Williams, the Hearing Examiner stated as follows:

To the contrary, by the end of the PSTA's case-in-chief, the record showed that Capt. Dougherty issued the disciplinary action reports to [Trooper Plant and Corporal Williams] for reasons unrelated to their protected

activity: (1) having misrepresented that the maintenance men had complained about disposing of Capt. Oliphant's trash and (2) having conducted an unauthorized investigation of Capt. Oliphant during work time.

Therefore, the Hearing Examiner concluded, based upon the credible testimony of Captain Dougherty, PSTA's own witness, that Trooper Plant and Corporal Williams were not disciplined for engaging in protected activity.

The PSTA next alleges that the PSP's failure to adequately explain the suspicious nature of the internal affairs investigation of Captain Oliphant evidences that the true targets of the investigation were Trooper Plant and Corporal Williams. The Hearing Examiner found that this allegation is untenable as it would require the Board to find that the PSP conspired from the initiation of the internal affairs investigation of Captain Oliphant to discipline Trooper Plant and Corporal Williams and that Major Skurkis, Captain Peters and Lieutenant Saites, among others, were involved in the conspiracy. Further, the Board would have to overturn the Hearing Examiner's determination that Captain Dougherty credibly testified that he issued the disciplinary action reports without instruction from anyone higher up in the chain of command. As stated by the Hearing Examiner, substantial evidence does not support the PSTA's allegation that the true targets of the internal affairs investigation were Trooper Plant and Corporal Williams. See Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974) (suspicion is not substantial evidence).

The PSTA also alleges that the PSP engaged in disparate treatment of Trooper Plant and Corporal Williams because they were disciplined while Captain Oliphant was not disciplined. To establish disparate treatment, the complainant must prove that the employer treated similarly situated employees differently from the complainant based upon their support or lack of support for the union. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989); International Brotherhood of Painters and Allied Trades Local Union 1968 v. Erie City School District, 40 PPER 12 (Final Order, 2009); Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004). Contrary to the PSTA's allegation, Trooper Plant and Corporal Williams are not similarly situated with Captain Oliphant. The PSP initiated an internal affairs investigation of Captain Oliphant for allegedly directing maintenance men to dispose of his trash. The PSP had determined in a previous case that similar conduct did not violate PSP regulations or the law. The PSP did not conduct an internal affairs investigation of Trooper Plant and Corporal Williams. Further, Trooper Plant and Corporal Williams were disciplined for misrepresenting that maintenance men had complained about disposing of Captain Oliphant's trash and conducting an unauthorized investigation of a member while on duty. There are no allegations or evidence that Captain Oliphant engaged in similar conduct. Accordingly, the PSP's failure to discipline Captain Oliphant does not show disparate treatment.

The PSTA additionally alleges that the PSP's discipline of Trooper Plant and Corporal Williams is inherently destructive of the employees' ability to voice concerns about working conditions without fear of reprisal. The Board will not require the complainant to provide proof of anti-union animus if it can reasonably be concluded from the record that the employer's alleged discriminatory conduct was inherently destructive of important employe rights. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); PSSU, Local 668, SEIU v. Mercer County, 24 PPER ¶ 24038 (Proposed Decision and Order, 1993). The Hearing Examiner concluded that Trooper Plant and Corporal Williams were disciplined for misrepresenting the facts and conducting an unauthorized investigation of a PSP member while on duty. Conducting an unauthorized investigation, Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 84 (Final Order, 2010), and conducting union business during working hours are not protected activities under the PLRA. Ellwood City Police Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999). Neither is misrepresenting the facts. Therefore, the PSP's actions in disciplining Trooper Plant and Corporal Williams are not inherently destructive of employe rights.

The PSTA further alleges that the Hearing Examiner erred in failing to consider the testimony of the PSP's witnesses in determining whether the PSP's actions were motivated by anti-union animus. However, the Hearing Examiner concluded that the PSTA failed to meet its burden of proving all three elements of a prima facie case of discrimination in its case-

in-chief. Because the PSTA failed to meet its burden, the burden never shifted to the PSP to prove a non-discriminatory motive and the Hearing Examiner did not err by declining to rely on the PSP's testimony in assessing whether the PSP engaged in discrimination. International Brotherhood of Painters and Allied Trades, Local 1968 v. Erie City School District, 39 PPER 8 (Final Order, 2008) (any evidence presented after union rests its case-in-chief could not be considered in determining whether union presented a prima facie case); Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 (Final Order, 1992) (same). We concur with the Hearing Examiner's conclusion that the PSTA failed to meet its burden of proving a violation of Section 6(1)(c) of the PLRA.<sup>2</sup>

The PSTA next alleges that the Hearing Examiner erred in concluding that it failed to allege an independent violation of Section 6(1)(a) because its Charge alleged that Trooper Plant and Corporal Williams were disciplined for engaging in protected activity. The PSTA further alleges that a Section 6(1)(a) violation may be independent or derivative when combined with an allegation of a Section 6(1)(c) violation, citing McMahon v. Springfield Township, 28 PPER ¶ 28164 (Final Order, 1997). The PSTA's reliance on Springfield Township is unavailing because the Board stated in that case that a violation of Section 6(1)(c) will also be a derivative violation of 6(1)(a) and that the finding of a derivative violation of 6(1)(a) renders a finding of an independent violation of 6(1)(a) unnecessary. Further, a review of the Charge reveals that the PSTA only alleged that Trooper Plant and Corporal Williams were disciplined for engaging in protected activity. Because the PSTA failed to allege that the PSP's actions interfered, restrained or coerced employees in engaging in protected activity, the Charge merely alleges a derivative violation of Section 6(1)(a). Teamsters Local Union No. 384 v. Kennett Consolidated School District, 37 PPER 89 (Final Order, 2006); Wattsburg Education Association v. Wattsburg Area School District, 35 PPER 27 (Proposed Decision and Order, 2004), 35 PPER 54 (Final Order, 2004); Derry Township Police Association v. Derry Township, 40 PPER 38 (Proposed Decision and Order, 2009). Accordingly, the Hearing Examiner properly concluded that the PSTA failed to allege an independent violation of Section 6(1)(a) in its Charge.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Pennsylvania State Troopers Association are dismissed and the December 3, 2010 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman and James M. Darby, Member, this seventeenth day of May, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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<sup>2</sup> The PSTA alleges that the Hearing Examiner made six findings of fact based solely on the testimony of PSP witnesses. The PSTA further alleges that the Hearing Examiner erred in relying on the testimony of PSP witnesses in concluding that the PSTA failed to meet its burden of proving a violation of Section 6(1)(c). Contrary to the PSTA's allegations, the Hearing Examiner merely relied on the evidence presented by the PSP for background information. Indeed, the Hearing Examiner based his decision on the credible testimony of Captain Dougherty, a PSTA witness, that he disciplined Trooper Plant and Corporal Williams for misrepresenting the facts and conducting an unauthorized investigation of a member while on duty.